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No. 81-2252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HONDA MOTOR COMPANY, LTD, and
AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

vs.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO., and
MISSION INSURANCE COMPANY,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

In their Brief in Opposition to Certiorari, Respondents Dorseys have substantially misstated portions of the record and attributed statements to the Court of Appeals and to Petitioners which neither made. To correct these misrepresentations, Petitioners file this reply.

A. The Accident

The Dorseys insist that this 45° angle collision between the Honda going 30 m.p.h. [655 F.2d at 653], and the Ford, weighing nearly three times more, was a "moderate impact," and that:

> In a properly designed car, the passenger compartment would not have failed and Glen Dorsey would have sustained no serious injuries. [Br. in Opp., p. 2]

This is contrary to the testimony of the Dorseys own expert witness that if an average American vehicle were hit at a 45° angle by a vehicle weighing three times as much he would expect serious damage and a serious possibility of injury to the driver [T.T. Vol. III, pp. 146-147].

B. Lack Of Evidence Of Honda's Fault

On the same page, the Dorseys refer to Honda's "own internal testing;" "actual knowledge as early as 1967," and defects "pointed out by its engineers." This is all contrary to the facts in the opinion of the Fifth Circuit that the testing was done by Honda R & D, and that the evidence of knowledge of the test results related to employees of Honda R & D. 655 F.2d at 653.

On page 3, Dorseys state that Honda admitted full responsibility for the design of the AN 600. In fact, in its Answer to the Third Amended Complaint on which the case was tried, Honda denied the allegation that it designed the AN 600 [R-688].

It was Honda which pointed out the distinctions between Honda and Honda R & D which had been made in the evidence during final argument to the jury [T.T. Vol. V, p. 757, 800]. The Dorseys, in rebuttal, told the jury to ignore that distinction [T.T. Vol. V, p. 806-807].

The Dorseys suggest that the decision in *Mercury Motors Express, Inc.* v. *Smith*, 393 So.2d 545 (Fla. 1981) did not represent a new rule of Florida law [Br. in Opp., p. 4, n.2]. If this were true, the Dorseys would have had to point out the evidence of fault on the part of Honda, rather than Honda R & D, in its initial brief in the Court of Appeals, instead of waiting to do it "for the first time" in a response to a petition for rehearing, as they claim [Br. in Opp., pp. 11 & 14]. The Fifth Circuit itself said that the law of Florida allowed punitive damages against a party which "was not itself at fault but was merely vicariously liable for punitive damages. . . ." 655 F.2d at 659. Additionally, the Florida intermediate appellate court in *Mercury Motors* noted the decision in *Alexander* v. *Alterman*, 350 So.2d 1128 (Fla. 1st DCA 1977) as being contrary to the long established rule in Florida. *Mercury Motors Express, Inc.* v. *Smith*, 372 So.2d 116, 117 (Fla. 3d DCA 1979).

The Dorseys insist that some evidence of fault and recklessness on the part of Honda, rather than Honda R & D, was pointed out "for the first time" in their response to Honda's petition for rehearing, and that the Fifth Circuit, after the response, "corrected" its earlier opinion and "ruled that Honda could not use *Mercury Motors* as an 'escape hatch' when the record abounds with evidence of fault . . ." [Br. in Opp., p. 14]. This is an incredible claim in light of the following facts:

1. The Fifth Circuit in its opinion denying rehearing did not state that it found any evidence of fault on the part of Honda;

2. The Fifth Circuit did not alter its reversal of the trial court's holding of no insurance coverage, while

maintaining that whether there was actual fault on the part of Honda was the key to that question [655 F.2d at 659];

3. The matters which the Dorseys now say constitute evidence of fault presented "for the first time"—1971 vehicle tests, a technical paper, and the verdict of negligent failure to warn—had been previously presented by Continental in its brief on the insurance coverage issue [5th Cir. Br. of Continental, pp. 12-17, 20, 24] to support faulty conduct by Honda, as opposed to Honda R & D, and the Fifth Circuit ruled that it was insufficient [655 F.2d at 660].

Several statements by the Fifth Circuit which were not modified or deleted show the lack of evidence of fault on the part of Honda. The Court of Appeals made it clear that the punitive damages award was reinstated because of the conduct of Honda R & D. 655 F.2d at 653-654. In the undeleted portion of the opinion dealing with insurance coverage, the Fifth Circuit said at 655 F.2d at 659:

> The key to this [coverage] question is whether Honda's liability for punitive damages is premised on its own fault or is merely vicarious.

The Court of Appeals also noted that Florida law permits insurance coverage of punitive damages "where the insured party was not itself at fault." 655 F.2d at 659. In deciding that issue the Fifth Circuit reversed the District Court's order that there was no insurance coverage for the punitive damages in this case. 655 F.2d at 660 and 670 F.2d at 22.

The argument that the Court of Appeals applied *Mercury Motors* to this case is inconsistent with the Dorseys' other argument that *Mercury Motors* did not apply because of the pretrial stipulation [Br. in Opp., p. 13]. Rather than applying *Mercury Motors*, the Fifth Circuit ruled that Honda could not rely on *Mercury Motors* because it was "too late for Honda to say post-trial that there was insufficient evidence of its own fault." 670

F.2d at 22. That ruling undercuts any argument that the Court of Appeals applied *Mercury Motors*.

The original opinion of the Fifth Circuit reflects the law of Florida *before Mercury Motors* that punitive damages could be awarded against a party without actual fault and that insurance coverage was available for such awards. 650 F.2d at 659. Thus, it was possible for the Fifth Circuit to reinstate the punitive award, based on Honda's vicarious liability, and reverse the ruling denying coverage, based on the lack of fault on the part of Honda. The decision in *Mercury Motors*, however, made that opinion internally inconsistent since *Mercury Motors* required some actual fault before one could be vicariously liable for punitive damages. The Fifth Circuit dealt with this inconsistency by deleting all of the references to the lack of record evidence on the question of Honda's actual fault, a question which the court itself called "the key" to the coverage issue. In its petition, Honda suggests that the deletion does not fulfill the duty of the Court of Appeals to apply controlling state law and does not conform to the accepted and usual course of judicial proceedings.

C. Burden Of Proof

In connection with Honda's argument that the decision of the Court of Appeals unconstitutionally shifts the burden of proof to the defendant, the Dorseys state that Honda is relying on the deleted language of the opinion as the basis for the argument [Br. in Opp., p. 12]. On the contrary, it is the language of the opinion denying rehearing which raises the problem, for it is there that the Fifth Circuit said that the evidence did not clearly distinguish between the acts of Honda and Honda R & D [670 F.2d at 22] and reimposed punitive damages, in spite of the law of Florida that the plaintiff *must prove* some actual fault on the part of the principal in order to recover punitive damages against the principal.

D. The Stipulation

In their brief, the Dorseys repeat the argument of the Fifth Circuit that Honda could not rely on *Mercury Motors* because it had stipulated that "in legal effect the acts of Honda R & D and its employees were its own acts." 670 F.2d at 22 [Br. in Opp., p. 13]. As noted in the petition for certiorari, that was not the stipulation. The stipulation, reproduced in the Fifth Circuit's opinion, 655 F.2d at 653, was that Honda, the manufacturer, was liable *by law* in negligence or breach of warranty for any defective designs of third parties. Honda did not stipulate that "the acts of Honda R & D and its employees were its own acts."

E. Compliance With Standards

Contrary to the Dorseys' suggestion that Honda's compliance argument was not raised until appeal, Honda argued at trial that compliance was evidence of reasonable care and compliance with all applicable regulations was one of the reasons the District Court granted judgment n.o.v. in favor of Honda on the claim for punitive damages. Neither of the lower courts considered that Honda had waived this issue, and both specifically ruled on it.

The extent of misrepresentation of the record done by the Dorseys in this case is best illustrated by their effort to suggest that Honda never argued compliance with the regulations as proof of reasonable care in the district court. They state:

> At trial, Honda did not articulate any such ground in its motion for directed verdict, requested no jury instruction on the point and conceded at the charge conference that compliance did not mean that it did not do anything wrong. [Br. in Opp., p.3].

While this language appears in the Fifth Circuit's opinion, 655 F.2d at 656, it has its genesis in the Dorsey Reply

Brief, pages 17-18, where the Fifth Circuit was told that Honda's counsel said:

> We never put a single man on the Witness Stand and said just because we [meet the regulations] we are not guilty.. . .
>
> . . .[A]nd I'm not going to argue that [compliance] proved we didn't do anything wrong.. . .
> (T.T. Vol. V, p. 721).

What was actually said was:

> [Honda Counsel] Judge, the only testimony in this case has been by the Plaintiff's own expert that those, that compliance with those standards resulted in a reasonably safe vehicle.
>
> * * * *
>
> We never put a single man on the Witness Stand and said just because we meant [sic-"met"] this we are not guilty.
>
> [The Court] Yes.
>
> [Honda Counsel] It is their evidence, their witness who testified to that fact.
>
> [The Court] Yes.
>
> [Honda Counsel] I think under the circumstances of this case, and I'm not going to argue that this proved we didn't do anything wrong, I'm going to argue that it proves according to their own expert they met the standard of care.
> (T.T. Vol. V, p. 721).

The jury was instructed under Florida law on the effect of the standards received in evidence [T.T. Vol. V, pp. 824-825], and Honda did argue that its compliance with the federal standards was reasonable care [T.T. Vol. V, pp. 766-770, 799-800].

In their Statement of the Case, Dorseys argue that the evidence showed that Honda developed an internal stand-

ard in anticipation of a federal regulation which was to go into effect six months after the Dorsey vehicle was manufactured and that Honda knew Dorsey's AN 600 did not comply with that standard [Br. in Opp., p.3].

In the record there is no evidence that the 1971 AN 600 failed to meet any company standard in effect at the time it was manufactured. The federal regulation which became effective six months after manufacture of the Dorsey vehicle was MVSS 208. That regulation was proposed in 1970; promulgated in early 1971, effective in 1972, and did not apply to Dorsey's vehicle. Development of the AN 600 began in the mid-1960's [655 F.2d at 652], years before MVSS 208 was proposed. Production of the American model began in 1969 [T.T. Vol. I, p. 172].

The Dorseys repeat their often repeated, but unsupported, allegation that the AN 600 failed to comply with MVSS 208, "a comprehensive standard which did deal with the claimed defect in this case." [Br. in Opp., p. 16]. Tests for compliance with MVSS 208 were received in evidence as Plaintiffs' Exhibits 26, 27 and 32 and Defendants' Exhibit 8.

Plaintiffs' Exhibit 26 was an MVSS 208 test done in December, 1971. The exhibit says that the car being tested was an AZ 600 C, "Year: 1972." The report stated:

> V. Conclusion
> The articles tested according to the Federal requirments [sic] meet the applicable standard.

Plaintiffs' Exhibit 27 was an MVSS 208 test done in December, 1971, on an AN 600 C, "Year: 1972." The report stated:

> V. Conclusion
> The articles tested according to the Federal requirments [sic] meet the applicable standard.

Plaintiffs' Exhibit 32 was an MVSS 208 test done on a 600 model [T.T. Vol. I, p.216] in October, 1971. The test

was done at 32.25 m.p.h., faster than the standard required, but the report said the car still complied with the standard, although there was some question of whether the forces on the head were within the standard.

Defendants' Exhibit 8 was an independent MVSS 208 test done under contract for the Department of Transportation on a 1972 Honda 600. That report states on page 15:

> The above test results indicate that the subject 1972 Honda 600 is in compliance with Federal Motor Vehicle Safety Standard 208.

Rather than "direct evidence of the failure of the AN 600 to meet the requirements of MVSS 208" [Br. in Opp., p.16], these exhibits were direct evidence that the AN 600, 1972 model, *complied* with MVSS 208. There were no test reports showing that the 1971 model did or did not comply with MVSS 208. Consequently, the most that could be said favorably to the Dorseys is that there was no evidence that the 1971 AN 600 complied with MVSS 208.

In opposing certiorari to review the question of the effect of compliance with the federal standards, the Dorseys completely ignore the federal preemption provisions of the statute. In final argument, the Dorseys told the jury:

> You are the community and you set the community standards by which we are all going to live. You can say what is proper, you can say what is acceptable, you can mark conduct with your approval as meeting the community standard, or you can reject conduct and say we want a better standard, a safer standard in our community.
> [Trans. Pl. Arg., p. 3].

Federal law, however, prohibits communities enacting "better" standards for motor vehicle safety. 15 U.S.C. § 1392(d).

Uniform standards are meaningless unless there is also a uniform measure of liability. A fuel tank placement

standard, for example, is meaningless if separate juries may find a manufacturer liable for placing a fuel tank behind, over, or in front of the rear axle. How can a manufacturer comply with such "standards"?

Federal law provides that suit may be brought even though the manufacturer complies with the federal standards, but it is silent as to the law that should govern that suit. A rebuttable presumption that compliance with all applicable federal regulations results in at least a minimally safe vehicle serves both purposes of the statute to provide uniform safety standards and access to the courts for injured people. Manufacturers would have some certainty about the standards to be applied in determining their liability, but would not be immune from suit.

The need for clarification of the relationship between 15 U.S.C. § 1392(d) and § 1397(c) is especially great in the area of punitive damages. In one sense, the Dorseys statement that "Honda is really contending . . . that absent violation of a safety standard, a manufacturer cannot be liable for punitive damages" [Br. in Opp., p.15] is correct, for if a manufacturer has taken care to comply with all applicable safety standards, how can a jury legitimately find a *complete* lack of care and reckless indifference to safety? In this case, the District Court ruled that they could not and entered judgment for Honda on the punitive damage claim. Thus, Honda is contending that, when there are safety standards, compliance with the standards defeats a claim for punitive damages. Certainly, when there are no standards at all, proof of violation of a standard is not only unnecessary, but impossible, and Honda is not advancing that proposition. Prohibiting punitive damages when there is compliance with all applicable standards does not restrict state common law standards permitting punitive damages in cases where there is no care, but gives proper legal effect to the

fact of compliance as evidence of some care, thus fulfilling the requirements of state law.

This is a federal statute which attempts to preempt all state safety regulations. Only this Court can announce standards to govern liability which would be uniform and fulfill the purposes of this statute. The question affects not just every manufacturer, but every individual in the United States who rides in a motor vehicle. Certiorari should be granted, so that these problems may be addressed.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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